pectfully agree. Since the onus of proof of this particular issue is on the defendant, he should at least give a positive date when the unauthorised erection was built. As I have rejected the evidence of the defendant on this issue, the defendant has, therefore, failed to prove that the complaint was not made within the requisite period of twelve months.

Finally, it is submitted by counsel for the defendant that the court should exercise its discretion under the second limb of the provision of section 16(1)(k) of the Control of Rent Act in refusing to allow vacant possession if the court considers that such order should not be made. Various grounds were put forward to support the contention why the order should not be made. Of these grounds, only two are worth mentioning. First, it is submitted that the defendant had been a tenant for twenty five years and had paid his rent regularly without fail and during this long period there had been no legal proceedings against him by the landlord or by any other person. I am not impressed by this argument in view of the admitted fact that the defendant is no longer occupying the said premises. He is now residing at a coffee shop No. 459, Jalan Tuanku Abdul Rahman, and is merely an inactive partner in the coffee shop business at No. 1 Jalan Pahang premises. Secondly, it is submitted that, in view of his age, he would be in financial difficulty if the order of vacant possession were to be made. I am equally not impressed by this argument in view of the admitted evidence that the defendant is a partner in a number of coffee shops in and around Kuala Lumpur. He owns 50% share in a coffee shop at Imbi Road, 10% share in a coffee shop in front of the Central Market, Kuala Lumpur, and also ¼ share in the coffee shop at No. 1, Jalan Pahang. He was also the sole proprietor of the coffee shop at No. 459, Jalan Tuanku Abdul Rahman, where he now resides, but he has transferred this particular shop to his son as a gift in early 1970. Apart from these partnerships, he also owns an Opel car and the only responsibility which he has is to support his two school-going children. Under the circumstances, the defendant cannot by any stretch of imagination be described as poor.

In the present case, I find the plaintiff had acted very reasonably. As soon as it was served with notice by the Municipality regarding the unauthorised erection, it had informed the defendant immediately regarding the notice and requested him to dismantle the erection. But the defendant did not take any concrete steps to do anything except to send letters to the two sub-tenants of the premises.

Under the circumstances, I give judgment for the plaintiff for an order that the defendant do deliver up vacant possession of the said premises forthwith to the plaintiff and pay double rent for wrongful possession at the rate of $118.00 a month from the 1st July, 1968 until date of delivery. However, I make no order as to costs. The order for vacant possession shall not, of course, affect the sub-tenants of the premises, if any.

Judgment for the plaintiff.

Solicitors: *Shook Lin & Bok; Mah & Kok.*

PUBLIC PROSECUTOR v. PHUA THIAN KANG

[A. Cr. J. (Sharma J.) April 23, 1971]

[Muar — Criminal Appeal No. 53 of 1970]

Income Tax — Notice — Call for information — Failure to comply with notice without reasonable excuse — Burden of proof — Evidence Ordinance, 1950, ss. 105 and 114 — Income Tax Act, 1967, ss. 81 and 120(a).

Evidence — Onus of proving "reasonable excuse" — Evidence Ordinance, 1950, s. 105.

In this case the learned magistrate had acquitted the accused on a charge under section 120(a) read with section 81 of the Income Tax Act. The charge against the accused was that he had without reasonable excuse failed to comply with the notice served under section 81. The learned magistrate acquitted the accused without calling for his defence as he found that there was no evidence at all that the defendant failed to furnish the information without reasonable excuse.

Held, allowing the appeal: the onus of proving "reasonable excuse" in this case was on the accused and therefore he should have been called upon to enter on his defence.

Cases referred to:-

(1) *Jones* v. *Axen* 1 Ld. Raym. 119 at p. 120; 91 E.R. 976.
(2) *R.* v. *Pratten* 6 T.R. 559; 101 E.R. 702.
(3) *Gill* v. *Scrivens* 7 T.R. 27; 101 E.R. 838.
(4) *R.* v. *Jarvis* 1 East 643 footnote; 102 E.R. 249.
(5) *R.* v. *Hazy* 2 Car. & P. 458; 172 E.R. 207.
(6) *Taylor* v. *Humphries,* 144 E.R. 216.
(7) *Davies* v. *Scarce* L.R. 4 C.P. 172 at p. 175.
(8) *Morgan* v. *Hedger* L.R. 5 C.P. 485.
(9) *Over* v. *Harwood* [1900] 1 Q.B. 803.
(10) *R.* v. *James* [1902] 1 K.B. 540.
(11) *Emperor* v. *Dahayabhai* A.I.R. 1941 Bom. 273.
(12) *Public Prosecutor* v. *Hambali* [1968] 2 M.L.J. 156.
(13) *Har Prasad* v. *Commissioner of Income Tax* A.I.R. 1957 All. 746.
(14) *Munnalal* v. *Commissioner of Income Tax* A.I.R. 1957 Nagpur 73.
(15) *Superintendent and Remembrancer of Legal Affairs to the State of West Bengal* v. *Sri Iswar Lakhi Janardan Thakur Jew* A.I.R. 1960 Cal. 170.
(16) *Anil Kumar Ghosh* v. *The State* A.I.R. 1953 Cal. 408.

MAGISTRATE'S CRIMINAL APPEAL.

Rahmat bin Jamari (Deputy Public Prosecutor) for the appellant.

Lee Kuan Meng for the respondent.

Sharma J. (delivering oral judgment): This is an appeal by the Public Prosecutor against an order of acquittal made by the magistrate, Batu Pahat, in respect of a charge under section 120(a) read with section 81 of the Income Tax Act, 1967. The charge against the respondent was that he had without reasonable excuse failed to comply with the notice served on him under section 81 of the said Act. The only person who appeared on behalf of the Department of Inland Revenue was P.W. 1 who had no personal knowledge of the existence or identity of the respondent but he did produce from the departmental file a copy of the notice which was sent to the respondent under A.R. registered post. This notice was addressed to "Enche Phua Thian Kang, 33E Jalan Suleiman, Batu Pahat." This was also the address given on the postal acknowledgment card and the signature on the

postal acknowledgment card also purports to be that of Mr. Phua. The charge itself gives the name "Phua Thian Kang" and his address as 33E Jalan Suleiman, Batu Pahat, Johore. The learned magistrate in his grounds of decision seems to have accepted the defence contention that there was no sufficient proof of the identity of the defendant and that was one of the grounds on which the learned magistrate acquitted and discharged the defendant without calling on his defence. The name of the defendant was called in court and in answer to that call he appeared.

Section 114 of the Evidence Ordinance states:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

The prosecution had proved the despatch of the notice under section 81 (Exhibit P2). The prosecution had also proved that this notice was received by the person to whom it was addressed at the address described in the notice. That was also the name of the person who was called to appear in court before the learned magistrate and he did in fact appear in answer to the call. Under those circumstances there was a presumption under section 114 that the defendant who appeared in court was in fact the person to whom that notice had been issued. This was, of course, only a presumption but it did, *prima facie*, establish the identity of the person who had not complied with the notice.

The second ground on which the learned magistrate acquitted and discharged the defendant involves rather a difficult question of law and this was a matter brought up only by the learned magistrate himself in the grounds of his decision as the point was never taken by the defence. Section 120(a) of the Income Tax Act in so far as it relates to the offence in question enacts as follows:—

"Any person who *without reasonable excuse* fails to comply with a notice given under section 81 ... shall be guilty of an offence and on conviction shall be liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both."

Section 81 of the Income Tax Act reads:

"The Comptroller-General may require any person to give orally or may by notice under his hand require any person to give in writing within a time specified in the notice all such information or particulars as may be demanded of him by the Comptroller-General for the purposes of this Act and which may be in the possession of that person...."

The learned magistrate in his grounds of decision states:

"The defendant must be proved to have failed to furnish the information required in the said notice *without reasonable excuse* as stated in the charge against him. There is no evidence at all that the defendant failed to furnish the information *without reasonable excuse*."

The law always presumes the innocence of the accused and on that ground the prosecution has to prove every fact necessary to substantiate the charge against the accused. In other words in criminal cases the burden of proof, unless shifted by legislative interference, always falls on the prosecution and in order to warrant a conviction the prosecution has of necessity to lead evidence to meet any defence that may be open to the accused by virtue of the offence defined in the statute. Thus if a statute in the direct description of an offence and not by way of a proviso contains a negative matter the charge must contain an allegation of such negative matter and that allegation itself must also be supported by *prima facie* evidence. In *Jones* v. *Axen*[1] the principle laid down by Treby C.J. is referred to in the following words:

"The difference is that where an exception is incorporated in the body of the clause, he who pleads the clause, ought also to plead the exception; but when there is a clause for the benefit of the pleader and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to shew the proviso."

This principle has been followed in subsequent English cases. (See *King* v. *Pratten*,[2] *Gill* v. *Scrivens*,[3] *Rex* v. *Jarvis*,[4] *Rex* v. *Hazy*[5] and *Taylor* v. *Humphries*[6]). In the case of *Davies* v. *Scarce*[7] Montague Smith J. said:

"I also think we must hold ourselves bound by the decision of this court in *Taylor* v. *Humphries*. It is a decision which is entitled to great weight. The court took time for deliberation and Erle C.J. seems to have bestowed much attention upon the Act of Parliament."

In *Morgan* v. *Hedger*[8] the court followed the decision in *Davies* v. *Scarce*. In *Over* v. *Harwood*[9] Channel J. discussing the law said: —

"The substantial point which the case was intended to raise, and which we have to decide, is whether there was any evidence, not whether there was sufficient evidence, of the appellant's disobedience to the order. I agree that the burden of proof of non-compliance is upon the prosecution. It is not unusual in modern Acts of Parliament to provide that the burden of proving a particular fact shall be on the defendant; but that is not the case in the Vaccination Act, 1867, so far as regards the particular matter before us. In some matters under that Act the burden of proof is undoubtedly thrown on the defendant; for example by the words 'if the child ... shall not be shewn to be then unfit to be vaccinated or to be insusceptible of vaccination'; and as those words occur in the section under which these proceedings were taken they shew that it was not intended to place the burden on the defendant of shewing that he has had his child vaccinated; the proof of non-vaccination therefore lies on the prosecution...."

Next we have the case of *Rex* v. *James*.[10] Lord Alverstone C.J. said at page 543:

"In *Thibault* v. *Gibson* (12 M. & W. 88; 152 E.R. 1122) Lord Abinger C.B. said: 'I believe it is a well established principle, that, in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty, exempting certain cases from its operation, the declaration or information must shew that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act, it is not necessary to notice it in the declaration or information, but it is a matter which the defendant must allege as a ground of defence.'

In the same case Parke B., after quoting a passage from *1 Wms. Saund* (*Sander's* case (1 Wms. Saund. 262a; 85 E.R. 311)) much to the same effect as the passage cited from Lord Abinger, proceeds as follows: 'In all cases of exception, where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it; and I have some doubt whether the same rule does not also hold, even where the exception comes by way of proviso in the same section, although it will not be necessary to decide that point at present.'

In the case of *Rex* v. *Jarvis* Lord Mansfield C.J. says: '... but where the exceptions are in the enacting part of a

law, it must appear in the charge that the defendant does not fall within any of them.'

'In *Steel* v. *Smith* (1 B. & Ald. 94; 106 E.R. 35) the marginal note is to the following effect: 'Where an Act of Parliament, in the enacting clause, creates an offence and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration.' In that case Bayley J. said: 'I cannot say that the proviso is part of the same sentence; for if it had been omitted, the preceding sentence would have been entire'."

The legislature now in many instances gets rid of the necessity for proving the negative either by a new enactment defining the offence afresh or by avoiding all mention of the negative matter but generally by expressly enacting that the burden of bringing himself within an exception contained in the definition of the offence itself shall lie on the defendant. Our Emergency Regulations were a typical example of that. The English law therefore appears to be that where an exception is contained in the definition itself, the prosecution must prove not only the case covered by the main or positive provision but also that it is not covered by the exception. The subsequent exception contained in a proviso or an exception is a matter for the defence and it is for the accused to show that he is exempted from the definition.

The provisions of our Evidence Ordinance relating to burden of proof are identical with the provisions of the Indian Evidence Act, 1872. Sir John Beaumont, who subsequently became a member of the Judicial Committee of the Privy Council, had to deal with a similar question in the case of *Emperor* v. *Dahayabhai*[11] and this is what he said:

"In India the rule is as laid down in section 105, Evidence Act...

It seems to me that that is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception, and there is no distinction between a case in which the exception is contained in the body of the Statute imposing the prohibition and a case in which it is not so included. I think, therefore, that we must hold that in this case, having regard to the terms of section 105, Evidence Act, the burden is upon the accused, who relies upon the permission given to him by sub-section (5) to prove that he comes within the terms of that sub-section, and is thereby relieved of the liability which is otherwise upon him under sub-section (7) and as there is no evidence before us that what he has done is not inconsistent with any provision of the Act, the conviction must be upheld."

Section 105 of the Evidence Ordinance provides:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, *or within any special exception or proviso* contained in any other part of the same Code, *or in any law defining the offence,* is upon him, and the court shall presume the absence of such circumstances."

The section requires the court to presume the absence of circumstances which may create the exception referred to in section 105 of the Evidence Ordinance. Section 120 of the Income Tax Act which I have already quoted above defines the offence and in the definition itself creates an exception. My view is that the provisions of section 105 therefore come into play as was held by Sir John Beaumont C.J. in *Emperor* v. *Dahayabhai*. Our law on the question of burden of proof therefore seems to be different from the English law in this respect. Chang Min Tat J. dealing with a case under section 106 of the Evidence Ordinance seems to have taken a similar view in the case of *Public Prosecutor* v. *Hambali*[12] where his Lordship has referred to various English authorities on the subject. I am no doubt dealing with the matter under section 105 of the Evidence Ordinance but it does appear that I can gain support from the views expressed by the learned judge in *Public Prosecutor* v. *Hambali*.

In *Har Prasad* v. *Commissioner of Income Tax*[13] the headnote states:

"If an assessee receives certain sums of money in the relevant accounting period, it is for him to explain the true nature of the source of those receipts. The taxing authorities could not be expected to provide evidence about facts which were within the special knowledge of the assessee. If the assessee does not explain what he alone could know, an inference is possible that the nature of the receipts were such as rendered him liable to tax. Under the circumstances it cannot be said that there was no material to justify the finding that the deposits came out of the assessee's income."

In another income tax case *Munnalal* v. *Commissioner of Income Tax*[14] the same view seems to have been taken and the headnote there states:

"Where the assessee fails to prove positively the source and nature of the impugned amounts received by him during the accounting year, the income-tax officer is entitled to draw the inference that the receipts are of an income nature and it is not necessary for the department to give positive evidence regarding the source from which the assessee made the disputed income. The burden of establishing in such cases that a disputed item is not the assessee's income lies on the assessee and not on the department."

I have in coming to my decision followed the reasoning given in the judgment of Sir John Beaumont C.J. in *Emperor* v. *Dahayabhai*. The principles of that case seem to have been followed subsequently in India in the case of *Superintendent and Remembrancer of Legal Affairs to the State of West Bengal* v. *Sri Iswar Lakhi Janardan Thakur Jew*.[15] I must, however, say that there are to be found in the law reports of India some cases which have not followed Sir John Beaumont's judgment in *Emperor* v. *Dahayabhai*. One of those cases is *Anil Kumar Ghosh* v. *The State*.[16]

As far as I am concerned I allow this appeal but should an application be made to me under section 66 of the Courts of Judicature Act, I shall be quite willing to refer the question of the burden of proof in such cases to the Federal Court. The case is sent back to the learned magistrate with the direction that he call upon the respondent to enter his defence.

Appeal allowed.

Solicitors: *Michael Chen & Lee.*